



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

JUDICIAL REVIEW NO. 8 OF 2016

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR AN ORDER OF PROHIBITION

AND

IN THE MATTER OF ALCOHOLIC DRINKS CONTROL ACT NO. 4 OF 2010 (MUTUTHO LAW)

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 AND THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015 AND ALL ENABLING LAWS OF REPUBLIC OF KENYA

BETWEEN

EVAN MWANGI KAMAU.....1ST APPLICANT

PETER NGANGA GACHINA.....2ND APPLICANT

TERESIA WANJIRU MURIGI.....3RD APPLICANT

-VERSUS-

TABITHA WATHIRA KARUNGARU

PROPRIETOR OF HIGH LIFE PUB.....1ST RESPONDENT

NAKURU COUNTY ALCOHOLIC

DRINKS CONTROL BOARD.....2ND RESPONDENT

NAIVASHA SUBCOUNTY ADMINISTRATOR.....3RD RESPONDENT

J U D G M E N T

1. Pursuant to leave granted by this court to the *ex parte* Applicants herein, they filed the Substantive Motion on 8/8/2016 seeking two key reliefs:

“1. This Honourable Court be pleased to grant an order of prohibition to restrain the 1st Respondent from operating a Bar known as High Life Pub, Maraigushu.

2. This Honorable Court be pleased to grant order of prohibition restraining the Respondents from granting a liquor licence to Tabitha Waithira Karungari trading as High Life Pub Maraigushu, Naivasha.”

2. The grounds on the face of the Motion and further expanded in supporting affidavit of **Evan Mwangi Kamau** the 1st *ex parte* Applicant are that:

“1) The 1st Respondent is operating High Life Pub at Maraigushu – Naivasha Sub County without a licence.

2) The 2nd and 3rd Respondents have allowed and/or permitted the 1st Respondent to operate a bar High Life Pub at Maraigushu without a licence.

3) The Respondents jointly and severally have contravened the express provisions of the Alcoholic Drinks Control Act (Mututho Law) of 2010 and the Nakuru County Alcoholic Drinks Act of 2014.

4) High Life Pub is less than 300 metres off Maraigushu Secondary School, Mitamaiyu Nursery School and Mitamaiyu Primary School which are educational institutions with persons under the age of 18 years.

5) The said High Life Pub is not exempted by Section 14 (93) of the Nakuru County Alcoholic Drinks Control Act.

6) The Acts of the Respondents contravene the express provision of Law in respect of sale of liquor with Nakuru County.” (sic)

3. The three Respondents in the matter are **Tabitha Waithira Karungari** the proprietor of **High Life Pub**, the **Nakuru County Alcoholic Drinks Control Board** and the **Administrator, Naivasha Sub-County** respectively. The 1st Respondent read malice in the Motion and by her Replying affidavit describes the *ex parte* Applicants as busy bodies with an axe to grind out of jealousy and business competition. She denied that the local schools named by the *ex parte* Applicants have any complaints against her operations.

4. Although she claimed that her bar was licenced, annexure **TWK1** said to be a copy of her licence was not attached. She asserted that the Motion is devoid of merit. The licence mentioned by the 1st Respondent was eventually annexed to the Replying affidavit of the 3rd Respondent sworn by one **Joyce Nyambura Njoroge** the secretary to the Naivasha Sub-County Alcoholic Drinks Control Sub-Committee and representative of 3rd Respondent. The 3rd Respondent also filed grounds of opposition. The 3rd Respondent is apparently the representative of the 2nd Respondent in the Sub-County.

5. By the said affidavit and grounds, the 2nd and 3rd Respondents repeat the 1st Respondents assertions to the effect that the 1st Respondent’s alcohol business was duly licenced upon complying with all requirements, including those related to minimum proximity to schools or learning institutions. Further that the *ex parte* Applicants had not availed themselves of the relevant complaint mechanism under the liquor licencing law.

6. The parties’ written submissions take cue from their respective affidavits and grounds. In summary, the *ex parte* Applicants reiterated the position that the 1st Respondent’s liquor outlet **High Life Pub** was unlicenced. That the renewal application for the licence number **97570** annexed to the Respondents’ affidavit as **JNW 1** is dated 13/1/2016, by which date the previous licence had expired and could not be

renewed.

7. The Applicants pointed out that the licence **JNW3** was not supported by evidence of relevant payments and compliance with requisite procedure under the County Liquor Law. The Applicants submitted that the licence was signed after the present Application was filed and was therefore dubious. The Applicants urged the court to grant the Application.

8. On behalf of the first Respondent it was argued that **High Life Pub** was properly licenced and not within close proximity of learning institutions. In her view the present application was malicious and premature as the Applicants had not exhausted the “internal redress” mechanisms as provided under Section 9 of the Fair Administrative Actions Act, by first lodging their complaint to the Nakuru County Alcoholic Drinks Control Committee. Finally that the application had been overtaken by events as the 1st Respondent had acquired a licence.

9. For their part the 2nd and 3rd Respondents argued that the matter of operating a bar without a valid licence lies with police whose mandate it is to enforce the law. The 2nd and 3rd Respondents submitted that the licence to the 1st Respondent was issued pursuant to the laid down procedure including inspection of premises and payment of fees; and that it entailed an opportunity for the public to raise objections to the granting of a licence. The Respondents contend that by their application, the *ex parte* Applicants have circumvented the alternative mechanism set out under the Fair Administrative Actions Act.

10. Finally it was argued that the actions of private individuals were not amenable to judicial review and that an order of prohibition cannot issue where a decision has already been made.

11. In supporting their submissions the 1st and 2nd Respondents relied on the decision of **Odunga J in Environment and Combustion Consultants Limited -Vs- Kenya Pipeline Limited & 2 Others [2016] eKLR**.

12. I have considered the material canvassed in respect of the application before me. I agree with the 2nd and 3rd Respondent’s submissions that the judicial review orders are not available in respect of actions by private members of the public. No legal authority is necessary for such a trite statement of law. Thus prayer 1 as crafted is non-starter.

13. In my considered view, the so called 1st Respondent is ideally an interested party rather than a Respondent. The misjoinder is a technicality which ought not to be exalted above the substance of the application in the present constitutional dispensation. See also **Republic & Another -Vs- Charles Lutta Kasamani t/a Kasamani & Co. Advocates & Another Civil Appeal (Application) No. Nai. 281 of 2005**.

14. The 2nd prayer and indeed the entire application was premised on two key grounds, namely that the 1st Respondent has continued to operate **High Life Pub** which is unlicensed, through the connivance of the 2nd and 3rd Respondents. That the said pub is less than 300 metres from three learning institutions. As already observed, the 1st Respondent by her affidavit asserts that the pub was licenced but alleged copies of licences described at paragraph 5 as ‘**TWK1**’ were not annexed as purported in her affidavit.

15. The replying affidavit of the 2nd and 3rd Respondents filed on 15/11/2016 annexed a copy of an application for a licence dated 13/1/2016 and a licence allegedly issued on 21/9/2016 in respect of **High Life Pub**, Maraigushu. This licence could not have been in existence at the time of the filing of this Motion and the 1st Respondents’ subsequent affidavit. Nor was the previous licence tendered in court. The halfhearted justification in the 2nd and 3rd Respondent’s affidavit that the previous licence was deemed to subsist until the issue of a new licence is therefore unsubstantiated. To my mind this state of affairs goes to support the *ex parte* Applicant’s suspicion of collusion between the 1st Respondent and 2nd and 3rd Respondents, which enabled the former to continue operating a bar without a licence.

16. The 2nd and 3rd Respondents argue that only a decision or action, rather than inaction is amenable to judicial review. Collusion where proved, is an action albeit of a passive nature and I cannot see anything in the Fair Administrative Actions Act that would oust the courts' intervention where such collusion affects the legal rights or interests of an Applicant.

17. The term “**administrative action**” is defined in Section 2 of the Fair Administrative Actions Act as follows:

- “(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates” (emphasis added)

18. That said, an order of prohibition would be unsuitable where inaction or omission is alleged. Regarding appropriateness of remedies, the Court of Appeal stated in **Republic -Vs- Kenya National Examinations Council *ex parte* Gathenji & Others [1996] eKLR Civil Appeal No. 266 of 1996:**

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.....Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice of procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings..... The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.....These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, the *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done.....Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

19. Thus an order of prohibition could not be available in this case in respect of the inaction by the Respondents. Under Section 11 of the Fair Administrative Action Act, a wide array of possible reliefs is

provided. In a proper case, the court would not necessarily be left without options: even where it may find that the relief sought by an Applicant is not appropriate, it can grant any other relief or reliefs under the Act.

20. In this case however, the 1st Respondent has now acquired the necessary licence and ground one of the Motion cannot succeed. There is no evidence led to support the Applicants' contention that the **High Life Pub** is operating within a radius of less than 300 metres from learning institutions with the knowledge and collusion of the Respondents. It would seem from the Applicants' material that they were either unaware of or did not participate in the process of the issuance of the licence to the 1st Respondent.

21. It is not clear how the 2nd and 3rd Respondents went about the process in order to ensure that parties who wished to object to or to appeal in respect of the licence grant had notice of the application. The ingenious argument that the 2nd and 3rd Respondents are not responsible for enforcement of the Nakuru County Alcoholic Drinks Control Act flies in the face of the 2nd Respondent's own depositions at paragraph 1, 2, 3, 6, 8, 9 *inter alia* of the Replying affidavit. Such a defence would not stand if there was evidence that the said Respondents had been made aware of the breaches stated by the Applicants.

22. So far as the Applicants are concerned, however, there is no evidence that a formal complaint had been made to Sub-County Alcoholic Drinks Sub-Committee to which **Joyce Nyambura Njoro**, the deponent of the said affidavit is a Secretary or to the 3rd Respondent. That ought to have been the first step.

23. The application before me has largely been overtaken by events as a licence has already issued in the 1st Respondent's favour. It is beyond the province of the court in this matter to inquire into whether or not it was procedurally issued, or whether the licence tendered is a forgery. The secretary of the Sub-Committee concerned having endorsed the same, this Motion would mutate into a new and different action if the court was to entertain the Applicants' new challenge on the supposed dubious process of issue. For the reason, I decline to consider the copies of the 1st Respondent's expired licences attached to the Applicants' submission.

24. Even where a challenge in respect of the process was to be raised, the court would not be concerned with the merits of the decisions but the process itself. Judicial review is not concerned with the merits of the decision or action of a public body. As stated in **Municipal Council of Mombasa -Vs- Republic and Umoja Consultants Limited Civil Appeal No. 185 of 2001** the Court of Appeal held that:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the person affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters..... The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision.” See also Republic -Vs- Kenya Revenue Authority *ex parte* Yaya Towers Limited.”

25. For all the foregoing reasons I do dismiss the Substantive Motion but in the circumstances of the matter each party to bear its own costs.

Delivered and signed at Naivasha this 24th day of **July, 2017**.

In the presence of:-

For the Applicants

For the Respondents

Court Assistant – Barasa

C. MEOLI

JUDGE